A

AMERICAN INTERNATIONAL ASSURANCE COMPANY LTD

v.

B

NADARAJAN SUBRAMANIAM

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
LIM YEE LAN JCA
MAH WENG KWAI JCA
C [CIVIL APPEAL NO: W-02-2987-2010]
6 MAY 2013

INSURANCE: *Duty of disclosure - Material non-disclosure - Discrepancy in estimated income of insured - Whether insured bound by*
D *warranty in proposal forms - Whether amounted to material non-disclosure or incorrect disclosure - Insurance Act 1996, ss. 149(4) & 150*

INSURANCE: *Accident insurance - Cause of death - Medical evidence - Whether death due to illness - Whether there was direct evidence of a*
E *fall - Whether beneficiary proved death caused by accident*

The insured purchased three personal accident insurance policies and in all three proposal forms, the insured stated that his estimated annual income to be RM150,000 and described himself as 'a self-employed managing proprietor of a business selling and
F buying oil palm bunches'. Subsequent to the insured's death, the respondent's claim under the policies, as the beneficiary, was declined by the appellant on the ground that the cause of death of the insured was due to an illness whilst the purported personal accident policies only covered accidental death sustained as a
G result of "bodily injury effected directly and independently of all other causes by accident". The respondent therefore commenced an action in the High Court which decided in favour of the respondent and hence this appeal by the appellant. The issues for determination in this appeal were: (i) whether there was material
H non-disclosure by the insured; and (ii) whether the insured's demise was an accidental death or due to illness.

Held (allowing appeal with costs)
Per Mah Weng Kwai JCA delivering the judgment of the
I **court:**

(1) While there was no incorrect disclosure or misrepresentation of an actual fact when the insured described himself as being 'self employed (Managing Proprietor) in the selling and buying

of oil palm bunches', there was a material non-disclosure or incorrect disclosure when the insured stated in the proposal forms that his estimated annual income was RM150,000 when in fact, he was only earning an annual income of about RM50,000. (paras 20 & 22)

(2) Part IV of the insurance policies clearly stated that the proposal forms shall be the basis of the insurance policies. The insured was therefore bound by the warranty in each of the three proposal forms that the answers given were true and that the answers would form the basis of the contract between the insured and the appellant. In the case of *Pacific & Orient Insurance Co Sdn Bhd v. VR Kathirvelu,* the court was not concerned with the 'basis clause' when concluding that the non-disclosure was not material, whereas in the instant case, the 'basis clause' was applicable to the contract of insurance entered into between the insured and the appellant (*China Insurance Co Ltd v. Ngau Ah Kau*; foll). (paras 23 & 28)

(3) The issue of whether there was a non-disclosure or incorrect disclosure or misrepresentation in an answer in the proposal form is a question of fact to be determined by the court. In light of the decision in *China Insurance Co Ltd v. Ngau Ah Kau*, it was not the court's function to inquire into the materiality of the answer. The answer to the question in the proposal form will be deemed material as the truth of the answer had been made a condition of the policy. In the circumstances, the appellant had discharged its burden of proving the allegation of non-disclosure or incorrect disclosure of a material fact in the proposal form. (pars 28 & 30)

(4) The proximate cause of the insured's death was consistent with a stroke which was an illness and not due to a fall. The findings by the learned trial judge that the insured died as a result of a fall was against the weight of the evidence as there was no direct evidence of a fall, only circumstantial, and the learned trial judge had made an inference therefrom. (para 31)

(5) The court was very mindful that it should be slow to interfere with and reverse any finding of fact made by a trial court. However, in the instant case, the finding of the learned trial judge had to be set aside in view of the strong medical evidence and the falsification of the answer to the cause of death question set out in the physician's statement. (para 31)

(6) The respondent, as the beneficiary, must show that the death of the insured was due to a risk insured by the policy, *ie*, that the insured died as a result of an accident (a fall) and not as a result of any other cause. However, the respondent had failed to show that the insured had died as a result of an accident. (paras 31 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Pengambil insurans membeli tiga polisi insurans kemalangan diri dan dalam ketiga-tiga borang cadangan, pengambil insurans menyatakan bahawa jumlah anggaran pendapatan tahunannya adalah RM150,000 dan menyatakan dirinya sebagai 'a self-employed managing proprietor of a business selling and buying oil palm bunches'. Selepas kematian pengambil insurans, tuntutan responden di bawah polisi-polisi tersebut, sebagai benefisiari, ditolak oleh perayu atas alasan bahawa sebab kematian pengambil insurans adalah penyakit manakala polisi-polisi kemalangan diri yang ditujukan hanya melindungi kematian disebabkan oleh kemalangan yang diakibatkan oleh "bodily injury effected directly and independently of all other causes by accident". Responden dengan itu memulakan tindakan di Mahkamah Tinggi di mana keputusannya memihak kepada responden dan oleh itu, rayuan ini oleh perayu. Isu-isu untuk dipertimbangkan dalam rayuan ini adalah: (i) sama ada terdapat ketidakpendedahan material oleh pengambil insurans; dan (ii) sama ada kematian pengambil insurans adalah akibat kemalangan atau penyakit.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mah Weng Kwai HMR menyampaikan penghakiman mahkamah:

(1) Walaupun tiada pendedahan salah atau salah nyata fakta sebenar apabila pengambil insurans menyatakan dirinya sebagai 'self employed (Managing Proprietor) in the selling and buying of oil palm bunches', terdapat ketidakpendedahan material atau pendedahan salah apabila pengambil insurans menyatakan dalam borang cadangan bahawa pendapatan anggaran tahunannya adalah RM150,000 apabila sebenarnya, dia hanya memperolehi pendapatan tahunan sebanyak RM50,000.

(2) Bahagian IV polisi insurans jelas menyatakan bahawa borang-borang cadangan adalah menjadi asas polisi-polisi insurans tersebut. Pengambil insurans oleh itu terikat dengan waranti dalam setiap daripada ketiga-tiga borang cadangan bahawa

jawapan-jawapan yang diberikan adalah benar dan bahawa jawapan-jawapan tersebut akan membentuk asas kontrak di antara pengambil insurans dan perayu. Dalam kes *Pacific & Orient Insurance Co Sdn Bhd v. VR Kathirvelu,* mahkamah tidak mempertimbangkan 'klausa asas' apabila memutuskan bahawa ketidakpendedahan tidak material, sementara dalam kes ini, 'klausa asas' adalah terpakai kepada kontrak insurans yang dimasuki di antara pengambil insurans dan perayu (*China Insurance Co Ltd v. Ngau Ah Kau*; diikuti).

(3) Isu sama ada terdapat ketidakpendedahan atau pendedahan salah atau salah nyata kepada soalan dalam borang cadangan adalah persoalan fakta yang perlu diputuskan oleh mahkamah. Berikutan keputusan dalam *China Insurance Co Ltd v. Ngau Ah Kau*, ia bukan fungsi mahkamah untuk menyelidik kepentingan jawapan. Jawapan kepada soalan dalam borang cadangan akan dianggap penting setakat kebenaran jawapan tersebut dijadikan syarat kepada polisi. Dalam keadaan tersebut, perayu telah melepaskan beban pembuktian dakwaan ketidakpendedahan atau pendedahan salah fakta material dalam borang cadangan tersebut.

(4) Alasan paling hampir bagi kematian pengambil insurans adalah konsisten dengan strok iaitu satu penyakit dan bukannya kerana terjatuh. Dapatan yang arif hakim bicara bahawa pengambil insurans mati kerana terjatuh adalah bertentangan dengan beban keterangan kerana tidak terdapat keterangan langsung bahawa dia terjatuh, hanya keterangan ikut keadaan, dan yang arif hakim bicara telah membuat inferens daripadanya.

(5) Mahkamah faham bahawa ia sepatutnya tidak campur tangan atau mengakas apa-apa dapatan fakta yang dibuat oleh mahkamah perbicaraan. Walau bagaimanapun, dalam kes ini, dapatan oleh yang arif hakim bicara perlu diketepikan memandangkan keterangan perubatan yang kuat dan penipuan kepada jawapan dalam soalan-soalan kepada sebab kematian yang dikemukakan dalam pernyataan doktor.

(6) Responden sebagai benefisiari, mesti menunjukkan bahawa kematian pengambil insurans adalah disebabkan oleh risiko yang diinsuranskan oleh polisi tersebut, iaitu bahawa pengambil insurans mati akibat kemalangan (terjatuh) dan bukannya disebabkan oleh apa-apa sebab lain. Walau bagaimanapun, responden telah gagal menunjukkan bahawa pengambil insurans mati akibat kemalangan.

Case(s) referred to:
Amanah Raya Bhd v. Jerneh Insurance Bhd [2005] 2 CLJ 393 CA ***(refd)***
Azizah Abdullah v. Arab-Malaysian Eagles Sdn Bhd [1996] 3 CLJ 426 HC ***(refd)***
China Insurance Co Ltd v. Ngau Ah Kau [1971] 1 LNS 171 HC ***(foll)***
Leong Luen Kiew & Anor v. The New Zealand Insurance Co Ltd [1939] 1 LNS 50 HC ***(refd)***
Pacific & Orient Insurance Co Sdn Bhd v. VR Kathirvelu [1992] 1 CLJ 348; [1992] 1 CLJ (Rep) 251 SC ***(dist)***
Regina Fur Company, Ltd v. Bossom [1958] Lloyd's Law Reports 425 ***(refd)***
Vasudevan Vazhappulli Raman v. T Damodaran PV & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***
Watts v. Simmons [1924] Lloyd's Law Reports 177 ***(refd)***

Legislation referred to:
Insurance Act 1996, ss. 149(4), 150

For the appellant - Andrew Khoo; M/s Khoo & Sidhu
For the respondent - Ram Karpal Singh; M/s Karpal Singh & Company

[Appeal from High Court, Kuala Lumpur; No: S9-22-04-2001]

Reported by S Barathi

JUDGMENT

Mah Weng Kwai JCA:

Brief Facts

[1] On 25 May 1998 the late Tholan Iyasamy (the insured) signed two proposal forms (rekod rayuan pp. 207 and 220) to purchase two classic PA personal accident insurance policies and on 1 June 1998, the insured signed another proposal form (rekod rayuan p. 232) to purchase a comprehensive PA personal accident insurance policy from the appellant.

[2] The sum insured for accidental death in the three policies issued were RM50,000, RM200,000 and RM30,000 respectively. On 3 June 1999, the sum insured for the first and second policies were increased from RM50,000 to RM100,000 and from RM200,000 to RM300,000 respectively.

[3] In all three proposal forms, the insured had stated his estimated annual income to be RM150,000 and under the column 'occupation' he had described himself as "a self-employed managing proprietor of a business selling and buying oil palm bunches".

[4] The insured passed away on 29 August 1999 at about 8.50am in his house.

[5] The respondent was named as the beneficiary in the third policy only.

[6] On 14 September 2000, the appellant declined the respondent's claim on the three policies on the ground that the cause of death of the deceased was intracerebral haemorrhage secondary to hypertension which was an illness whilst the purported personal accident policies only covered accidental death sustained as a result of "bodily injury effected directly and independently of all other causes by accident".

[7] By a writ of summons dated 2 January 2001 the respondent claimed that the insured had died as a result of an accident when he fell in the toilet of his house on 29 August 1999 and not that he died from hypertension. The respondent accordingly claimed for the sums insured totaling RM430,000 together with general damages, interest and costs.

The High Court Trial

[8] At trial, three issues were agreed to be raised for the determination of the court namely whether:

(a) the respondent was the nominee in all the three policies;

(b) there was material non-disclosure by the insured; and

(c) the death of the insured was due to an accident or due to an illness.

[9] After a full trial the learned judge held that the respondent was a nominee of the insured in all the three policies, that there was no material non-disclosure by the insured in the three proposal forms and that the death of the insured was due to a fall in the toilet within the meaning of the terms of the insurance policies and was not due to illness. Judgment for the sum of RM430,000 together with interest at 8% per annum on the judgment sum and costs of RM20,000 was accordingly entered for the respondent.

[10] The appellant being dissatisfied with the decision appealed against it.

A **The Appeal**

[11] At the hearing of the appeal, counsel for the appellant informed the court that he was abandoning the issue of whether the appellant was the nominee in all the policies and that he
B would be submitting on the remaining two issues of whether there was material non-disclosure by the insured and whether the insured's demise was an accidental death or due to illness.

The Decision

C **[12]** Upon reading the record of appeal, the written submissions of counsel for the appellant and the respondent and upon hearing counsel aforesaid the court allowed the appeal and set aside the order of the High Court.

D **[13]** The respondent being dissatisfied with the decision now applies for leave to appeal to the Federal Court.

[14] Grounds of Decision

First issue – Whether There Was Material Non-Disclosure By The
E *Insured*

(a) A quick read of the three proposal forms shows the answers given by the insured to be as follows:

F In Proposal Form Nos. 1 and 2.

B. Details of Occupation

1) Occupation – Self employed (Managing Proprietor).

Exact duties – as above.

G

Nature of Business – selling and buying oil palm bunches.

2) What is your estimated annual income? RM150,000.

H and in Proposal Form No. 3

5. Occupation - Managing Proprietor.

Please state exact duties – Selling and buying oil palm bunches.

I

10. What is your estimated annual income – RM150,000.

[15] At trial, counsel for the appellant sought to prove that the insured's estimated annual income was nowhere near RM150,000 but was at a very much lesser sum. Lee Siew Choo (DW2), in her evidence-in-chief testified that investigations carried out by the appellant revealed that the insured was a general worker at the Sungai Samak Estate in Ulu Bernam earning a monthly salary of RM290. Reference was made to the letter dated 16 March 2001, an agreed document, received by the appellant from Golden Hope Plantations (Peninsular) Sdn Bhd which stated that the insured was employed as a general worker in Sungai Samak Estate with a last drawn salary of RM290 per month. The insured having been born on 20 November 1937 retired in 1992 when he reached 55 years of age.

[16] The respondent (PW1) in his witness statement in answer to questions 31 to 33 said that the insured had worked in Sungai Samak Estate and that upon reaching 55 years of age the insured and PW1 started a business in buying and selling oil palm bunches in 1997 and that the joint profit was about RM100,000 per annum.

[17] Going by the letter from Golden Hope Plantations the insured earned about RM3,480 per annum in 1992 and according to the evidence of PW1 the insured earned about RM50,000 per annum (on the basis of an equal partnership) in 1997. Pursuant to the three proposal forms dated in May/June 1998, the insured had declared that he was earning about RM150,000 per annum.

[18] Now given the discrepancy in the estimated annual income of the insured, the important question to be determined by the court was whether the non-disclosure or rather the incorrect disclosure by the insured was material.

[19] In his grounds of judgment the learned judge held that the discrepancy as to the amount of income earned was not sufficient for the appellant to repudiate liability on this ground. The learned judge was of the view that as these were accident policies, it should not matter to the appellant whether the insured was earning about RM50,000 or RM150,000 per annum as what really mattered would be the nature of his employment that is, whether the insured was employed in a high risk job where accidents were extremely likely.

[20] This court is of the view that while there was no incorrect disclosure or misrepresentation of an actual fact when the insured described himself as being "self employed (managing proprietor) in the selling and buying of oil palm bunches", there was a material non-disclosure or incorrect disclosure when the insured stated in the proposal forms that his estimated annual income was RM150,000.

[21] Pursuant to s. 149(4) of Insurance Act 1996 (the Act) the insured is obliged to disclose in the proposal form all the facts which he knew or ought to have known fully and faithfully, otherwise the policy issued may be invalidated. Under s. 150 of the Act, the insured must disclose to the appellant before the contract of insurance was entered into any matter which the insured knew would be relevant to the decision of the appellant on whether to accept the risk or not and the rates and terms to be applied or any matter a reasonable person in the circumstances could be expected to know to be relevant.

[22] In the instant case, the insured was not of utmost good faith *(uberrimae fide)* when he informed the appellant that he was earning an estimated annual income of RM150,000 when in fact, according to PW1, he was only earning an annual income of about RM50,000. The big difference in the estimated income of about RM100,000 per annum is a material fact as it may have a bearing on the true occupation of the insured and this in turn may affect the decision of the appellant on whether or not to accept the risk and consequently to determine the rates/premiums and terms to be applied in the policies issued by the appellant.

[23] The insured was bound by the warranty in each of the three proposal forms that the answers given were true and that the answers would form the basis of the contract between the insured and the appellant. In part IV of the insurance policies, it was clearly stated that the proposal forms shall be the basis of the insurance policies.

[24] In *China Insurance Co Ltd v. Ngau Ah Kau* [1971] 1 LNS 171; [1972] 1 MLJ 52, the Federal Court held that when a proposal for an insurance policy contains such a warranty and the policy expressly states that the proposal form is to be the basis for the policy, the truth of the answers to the questions in the proposal form are deemed to be material. The court held that the truth of the answers to the questions had been made a condition

of the contract of insurance and it was not open to the trial judge to consider the question of whether the answers to these questions were material or not.

[25] Counsel for the respondent submitted that it was not in all cases of non-disclosure that an insurer could repudiate a policy. The non-disclosure had to be material and in support counsel relied on the Supreme Court case of *Pacific & Orient Insurance Co Sdn Bhd v. R. Kathirvelu* [1992] 1 CLJ 348; [1992] 1 CLJ (Rep) 251; [1992] 1 MLJ 249. Counsel submitted that the learned judge was perfectly entitled to reject the appellant's contention on non-disclosure on the ground that the non-disclosure, even if it was true, was not material as the same did not, in any way, affect the nature of the policies, which in this case, were accident policies.

[26] In the *Pacific & Orient case (supra)* His Lordship Gunn Chit Tuan SCJ (as he then was) delivering the judgment of the court held that the court did not consider as a matter of fact that it was material for the plaintiff to have disclosed in the proposal form that he had early cervical spondylosis, haemorrhoids, labile hypertension or peptic ulcer as they are not serious diseases or illnesses of the same genus as those mentioned in an earlier question and that the defendant was not entitled to repudiate the policy on the ground of non-disclosure of material facts.

[27] Counsel for the respondent further submitted that in light of *Pacific & Orient*, which was decided 20 years later, the principle in *China Insurance* was no longer applicable.

[28] We are of the view that firstly, the issue of whether there was a non-disclosure or incorrect disclosure or misrepresentation in an answer in the proposal form is a question of fact to be determined by the court and secondly, given the decision in *China Insurance (supra)*, it is not the court's function to inquire into the materiality of the answer. The answer to the question in the proposal form will be deemed material as the truth of the answer has been made a condition of the policy. It will be noted that *China Insurance* was not considered by the Supreme Court in *Pacific & Orient*. It will be further noted that in *Pacific & Orient* it was a finding of the court made on the facts of that case that the non-disclosure was not material. In any event, in *Pacific & Orient* the court was not concerned with the "basis clause" when concluding that the non-disclosure was not material whereas in the present case, the "basis clause" was applicable to the contract of

insurance entered into between the insured and the appellant. Accordingly the *ratio* in *China Insurance* will still be applicable. In short, the court with respect cannot agree with counsel for the respondent that *Pacific & Orient* has set aside the decision in *China Insurance* and that what is only material is the nature of employment of the insured and not the amount of his annual income.

[29] It is observed that the learned trial judge did not consider the decision in *China Insurance* in his grounds of judgment although the same had been referred to by counsel for the appellant in his submission. If he had so considered perhaps he would have arrived at a different conclusion.

[30] The court was satisfied that the appellant had in the circumstances discharged its burden of proving the allegation of non-disclosure or incorrect disclosure of a material fact in the proposal form (see *Azizah Abdullah v. Arab-Malaysian Eagles Sdn Bhd* [1996] 3 CLJ 426; [1996] 5 MLJ 569).

[31] *Second Issue – Whether The Death Of The Insured Was Due To An Accident Or Due To An Illness*

(a) The coverage of each of the three policies was for "accidental death" and each of the policies contained an exception clause stating that the coverage shall not apply to loss caused directly or indirectly, wholly or partly, by a disease or sickness.

(b) It was the pleaded case of the respondent that the insured died as a result of a fall in the toilet of his house.

(c) In the sijil kematian and permit menguburkan, the cause of death was stated as "intra cerebral haemorrhage".

(d) It was not disputed by the parties that there was no eye witness to the insured's alleged fall in the toilet on 29 August 1999 at about 8.50am. In the absence of any direct evidence what was adduced in court by way of evidence for the respondent was that Muniandy Palar (PW3), saw the insured lying on the floor when he arrived at the scene. Neither he nor the respondent, who was called as PW1, had any personel knowledge of whether the insured did sustain a fall which caused his death.

(e) The appellant called Dr. Mohd Yassim Abd Rahman (DW1), the "Pengarah" of Hospital Teluk Intan to prove that the proximate cause of death of the insured was due to an illness. In his medical report dated 9 May 2000, a part A document, DW1 stated that there were no external injury, bruises or haematoma noted on the body and that intracerebral haemorrhage or bleeding in the brain was due to "the spontaneous rupture of smaller blood vessels probably caused by underlying hypertension". A B

(f) In the post mortem report dated 29 October 1999 which was signed by DW1, prepared from the records of Dr. Hon Mun Cheng who had performed the post mortem, the cause of death was listed as "intracerebral haemorrhage" only whereas in the appellant's physician's statement signed by DW1 on 22 October 1999 (exh. D3) the primary cause of death was purportedly stated as "intracerebral haemorrhage due to fall in the bathroom". In his evidence-in-chief DW1 stated categorically that the words "due to fall in the bathroom" were not in the physician's statement when he signed the same. Further, DW1 confirmed that the words "history of fall in the bathroom. He was later unable to move or talk" were also not in the statement when he had signed it. When questioned by the learned judge, DW1 clearly stated that in this case the intracerebral haemorrhage must have occurred before the fall. C D E F

(g) On the evidence, the court is satisfied that the proximate cause of death was consistent with a stroke which is an illness and not due to a fall. PW3 had stated that the insured did not have any signs of external bleeding which would explain any trauma suffered by the insured while DW1 maintained that only severe trauma to the head of the insured would have caused haemorrhage as opposed to a stroke prior to the fall. In such circumstances the court is of the view that the insured must have suffered the intracerebral haemorrhage before the fall. The court's finding is fortified by the fact that the words "due to a fall" must have been inserted by a person or persons unknown in the physician's statement after it had been signed by DW1, thereby casting a grave suspicion on the evidence of the respondent's case. This finding was notwithstanding the finding of the learned trial judge that the insured had no history of hypertension in the months before his death. G H I

(h) We are of the view that the finding by the learned trial judge that the insured died as a result of a fall was against the weight of the evidence. We are keenly aware that there was no direct evidence of a fall, only circumstantial and that the learned trial judge had made an inference therefrom. This court is very mindful that it should be slow to interfere with and reverse any finding of fact made by a trial court. The court is also mindful of the decision of the Federal Court in *Vasudevan Vazhappulli Raman v. T. Damodaran PV & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101; [1981] 2 MLJ 150 where it was said that "an appellate court should not reverse a judge's decision on a mere "measuring cast" or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion". However an appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong. In the instant case, the finding of the learned trial judge had to be set aside in view of the strong medical evidence of DW1 and the falsification of the answer to the cause of death question set out in the physician's statement.

(i) It is trite law that the respondent as the beneficiary must show that the death of the insured was due to a risk insured by the policy. In other words, the onus was on the respondent in this case to show that the insured died as a result of an accident (a fall) and not as a result of any other cause (see *Leong Luen Kiew & Anor v. The New Zealand Insurance Co Ltd* [1939] 1 LNS 50; [1939] MLJ 136; *Regina Fur Company Ltd v. Bossom* [1958] Lloyd's Law Reports 425; *Watts v. Simmons* [1924] Lloyd's Law Reports 177 and *Amanah Raya Bhd v. Jerneh Insurance Bhd* [2005] 2 CLJ 393).

[32] The finding of this court is that the respondent had failed to show that the insured had died as a result of an accident. In the result, the appeal was allowed with costs of RM10,000.